

MT LEGISLATIVE HISTORY

Chapter 735 1985

Bill H (S) 467

Original bill & hist. C

H. Committee on Agriculture, Livestock & Irrigation S. Committee on Agriculture, Livestock & Irrigation

Hearing Date(s) Apr 15 ☒ C

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Did this bill originate in an interim committee? Yes No

Committee

Report

(To be kept current -- post bills when entering being heard or leaving committee.)

Form CS-12

STATUS SHEET

49th LEGISLATIVE SESSION

COMMITTEE ON AGRICULTURE

<u>SENATE</u> BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CON- CURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CON- CURRED IN DATE
68	1-18-85	3-6-85	3-6-85					3-6-85	
157	1-29-85	3-6-85	3-6-85					3-6-85	
129	2-27-85	3-3-85		REFERRED	TO BUSINESS AND	LABOR COMMITTEE ON	3-7-85		
154	2-27-85	3-11-85	3-11-85				3-11-85		
301	3-4-85	3-13-85	3-13-85					3-13-85	
378	3-4-85	3-13-85	3-13-85				3-13-85		
201	2-27-85	3-11-85	3-11-85				3-11-85		
467	4-19-85	4-19-85	4-19-85				4-19-85		
HJR 40	3-11-85	3-13-85	3-13-85	3-13-85	3-13-85				

Use a separate sheet for Senate, House Bills, and Resolutions

CHAIRMAN--BOYLAN, PAUL
NORMAL SCHEDULE--> SITE: ROOM 413/415

DAYS: M-W-F

TIME: 1:00-3:00 P.M.

SECRETARY--TENNESON, RITA

BILL NO	REFER DATE	HEARING DATE	CONSIDERATION DATES	COMMITTEE ACTION	REREFERRED TO COMM	DATE OUT
SBD448	2/20	2/22		DO PASS		2-22
LYBECK, RAY				AUTHORIZE BOARDS OF COUNTY COMMISSIONERS TO LICENSE HORSE RIDING STABLES		
SBD467	4/11	4/15		PASS AS AMENDED		4-15
GALT, JACK E.				RATIFICATION OF MONTANA-FORT PECK WATER RIGHTS COMPACT		
SJ0004	1/09	1/16	1/16	PASS AS AMENDED		1-16
LANE, LEO				HONORING LARRY PEABODY; NATIONAL BAREBACK CHAMPION		
SJ0010	1/18	1/25	2/01	PASS AS AMENDED		2-1
NEUMAN, TED				JOINT RESOLUTION ASKING SPECIAL COMMITTEE TO RECOMMEND FARM LEGISLATION		
SJ0028	2/22			DUPLICATE BILL TO HJ28- NOT ACTED UPON		
WEEDING, CECIL				ASK FEDERAL GOVERNMENT TO FREEZE CMR REFUGE GRAZING FEES		
SJ0041	4/11	4/15		DO PASS		4-15
MAZUREK, JOSEPH P.				URGE CONGRESSIONAL LEGISLATION FOR FORT PECK WATER MARKETING		

MINUTES OF THE MEETING
JOINT SENATE AND HOUSE AGRICULTURE,
LIVESTOCK & IRRIGATION COMMITTEES
MONTANA STATE SENATE

April 15, 1985

The Joint Senate and House Agriculture, Livestock and Irrigation Committee meeting was called to order on the above date in Room 325 (old Supreme Court), of the State Capitol Building, at 7:15 p.m., by Chairman Boylan.

ROLL CALL: Senate Committee: Senator Severson excused, all other members present. House Committee: Representative Poiff excused, all other members present.

SENATE BILL 467: Senator Jack Galt, SD 16, told the committees that, when he came to Legislature, he never thought he would have a bill as important as this one. It is important to western Montana and the entire United States. The bill will apportion and codify the reserved water rights of the Fort Peck Reservation, consisting of the Assiniboine and Sioux Tribes in northeastern Montana. Reserved water rights are a very strong doctrine in national water law. Every time there was a reservation made by the federal government for any purpose, not only Indian reservations, but forest reserves and national parks, along with that goes a reservation of water to fulfill the purpose of the reservation of land. On the Indian reservations, their primary purpose is agriculture. This was constituted in the times when the tribes were being restricted to these reservations and the government was trying to make agriculturists out of them. That was the primary purpose to get the Indian people in a position where they could support themselves through agriculture. When the reservations of land were made, they made a reservation of water for the purpose of the Reservation. This is firmly established in law. He was not sure if the Winters Doctrine, which was established in Montana, was the first to establish this, but it firmly established the fact that any reservation of federal land for a purpose along with it went the reservation of water. SB 467 will codify the water that was reserved to fulfill the reservation of the Fort Peck Tribe. These federal reservations of water are unique in that they don't have to be used. They are established at the date of the reservation of the land and they are there forever. They are not like you and I, Senator Galt said. We have to show we have put this water to beneficial use. These go with the land as long as the reservation of land is there. This is our first attempt through negotiations to codify a reserved water right. You have two options. You can either negotiate these things or you can litigate them. There have been suits all over the western United States litigating these things, none of them very satisfactory and all of them very expensive. When we established SB 76 in 1979, Senator Boylan was the principal author of that bill, we realized then if we were going to have a statewide adjudication of water, we had to address these reserved water

rights whether they were Indian rights, forest service rights, national park service rights or Department of Defense rights. Every federal reservation of land has this water and we have to address it. We cannot have a complete adjudication of our water in Montana if we don't address and codify these reserved rights. Authors of SB 76 realized this and set up a Compact Commission to negotiate this. Our next witness will be the Chairman of this Reserved Water Right Compact Commission and he will go more fully into that. Again, Senator Galt said he wished to impress upon the committees that they were addressing one of the most serious things they will have to address. Not only in this legislation, but in the 12 or 15 years he has been around here it is by far the most important thing he has ever addressed and he hoped the testimony tonight will impress upon the committees how important it is for the State of Montana to go forward in this direction to solve our water problems throughout the State. He asked Chairman Boylan if he may call upon the witnesses to testify. Senator Boylan answered, yes.

Senator Galt then called on Gordon McOmber, Chairman, Montana Reserved Water Rights Commission. Mr. McOmber told the Committee that they are a Commission of the Legislature. The Legislature determined it was better to negotiate than go to court and provided for the appointment of the Commission, funded it and gave it some marching orders. After 5 years, they are coming in with their first proposal. He said he was not going to apologize for taking five years as it took the State of Montana 20 years to get the Yellowstone Compact and it was turned down a couple times. They feel they now have a Compact that will stand the test of time. After 5 years they have concluded this is our best shot and think it is the best shot for the State of Montana and much better than going to court. Regarding the money we spent, when you put that up against the millions it is going to cost if you go to court, and we know it will cost millions because Wyoming has spent that much money, it is not as large an amount. He complimented their staff and Chief Negotiator, Urban Roth, Program Chairman, Scott Brown and attorney, Marcia Rundel. Considering the caliber of these people and the dedication of the Commission he felt they have done a very fine job. This Compact has the approval of Governor Schwinden, the Attorney General and he had a call from Judge Lesley in Bozeman asking to express his approval of this Compact. Judge Lesley felt it would work right in with his program.

Senator Galt said page 8 of the bill gets into the quantity of water and called upon Scott Brown, Program Manager, to go into this. Mr. Brown said there are four issues resolved in this Compact. They are the quantity, protection of existing uses, marketing for the Tribes and water and jurisdiction of administration. He was going to talk on quantity. We hear much about litigation throughout the western part of the United States and it is normally the quantity of the reserved water right that is resolved in these litigation proceedings, he said.

He called attention to the display he had brought which shows the major streams on the Fort Peck Reservation. The Reservation is in the extreme northeast corner of Montana. A small preimeter of non reservation land is found north and east of the Reservation. The main stream is Big Muddy Creek which rises in Canada. It forms the eastern boundary of the Fort Peck Reservation. Also arising in Canada and going through the central part of the Reservation is Poplar River with its three forks. The western boundary of the Reservation is largely Porcupine Creek and, to a smaller extent, the Milk River. The south boundary is the Missouri River. Fort Peck Reservoir is just slightly upstream of the Fort Pect Reservation. The Reservation is slightly more than 2 million acres in size, perhaps one of the largest reservations in the United States, to have its rights codified. Very early in these negotiations we, who work for the State of Montana, were rather shocked to find the quantity of water rights associated with Indian Reservations is large. For example, in Arizona a reservation along the Colorado River, which is only a fraction the size of this one was, in a 1960's court outcome, found to have a diversion right slightly in excess of 700,000 acre feet per year. He then pointed out, on a chart, the figures arrived at in this Compact. The uppermost figure, 1,050,472 thousand acre feet per year is the Tribe's total diversion right of surface water and ground water and for all purposes for which they may divert water. Half of that figure, 525,236 acre feet represents the amount the Tribes are entitled to divert from surface water sources. If they are to divert the total of slightly more than a million, they must find that from gound water sources. While we don't know much about the ground water on the Fort Peck Reservation, we do know there are some substantial sources of ground water. 475,000 acre feet per year represents again half of the 950,000 acre foot figure and that's what the Tribe may consume from surface water sources. He then explained how they arrived at that amount. While we were researching these cases throughout the western United States we found the Tribes's rights are determined by courts on the basis of practicably irrigable acreage. That's to take into consideration the fact Tribes don't have to put to use the water that they are granted. This is the waters that are to be set aside for them in perpetuity and it was decided in the Arizona B California case a little more than 20 years ago that a fair means of determining the Tribal water right was through determining practicably irrigable acerage. If we had done this in court to each side, the United States on behalf of the Tribes, the State would have sent out legions of soil scientists, engineers and the like to determine the irrigable lands on that Reservation. We tried to find a simpler means of determining the quantity in which the Tribe was entitled. The area in red (Exhibit #1), represents roughly one third of the Reservation and through negotiations with the Tribe's consultants, we arrived at a 300 foot lift out of the Missouri River, recognizing that some lands below 300 feet, if you determine the economics of that lift, might be found not to be economically irrigable. However, 2/3 of the Reservation that exists above that line

with small surface water sources and ground water sources, we determined that some of those would almost certainly have been found to be irrigable, but we eliminated 2/3 of the Reservation and then identified, using Soil Conservation Service soil surveys, those lands that are irrigable given a water supply below that 2300 foot line were they 300 feet above the Missouri River. We found roughly half a million acres to be in a prime category. Anyone familiar with SCS surveys will know capability class 2,3,4 lands and there are very few capability class 4 lands; they are largely 2 & 3, if given a water supply which are irrigable. If you remove the amount of land that is irrigable and does not belong to the Tribes, because roughly 50% of this Reservation belongs to non Indians, you then have a figure of 280,000 acres that are irrigable. We applied 3.6 acre feet per acre which we feel is a rather conservative diversion figure, and a 1.8 acre feet per acre consumptive use figure and arrived at the above figures.

Article IV. - Protection of Non Indian Users.

Senator Galt called upon Gordon McOmber to talk about the protection of present users of water. Gordon McOmber addressed the issue of protection of non-Indian water users on the Reservation. Last week they held public meetings at Plentywood, Wolf Point and Scobey and explained the provisions of the Compact to the people up there. While there they met with Caleb and Norman Hollow, the Chairman of the Tribal Council. Two years ago they were just ready to introduce a Compact to the Legislature with the Fort Peck Tribe and ran into some problems at the last minute, Mr. McOmber said. It was embarrassing to us and put the officials of the Tribe in a very difficult position. They have come back and taken care of the problems and now have the support of the State agencies who had raised those questions before. The Tribal water right is 1888 because that is when that Reservation was established. The Tribal water rights have an effective date of 1888. Since then non Indians have gone into the Reservation and put water to use. Under the Winters Doctrine, those rights are all inferior to the Tribal rights. Should the State go to court, the Indian right is a better right than the non Indian right. Those people were very apprehensive to what would happen to them if they lost that right. Some have been there 2 and 3 generations. The Tribal officials have agreed in this Compact to protect those rights so that anyone on a Reservation that is using a non Indian right will have that right guaranteed senior to any future use of the exercise of the Tribal right on the Reservation. The Tribes have put some water to use and that will be superior to the non Indian water use. Anyone who has water use on the Reservation up until the end of 1984 will have a use that will be senior to any future use of the Tribe. However, it has to be a legitimate use. If someone is claiming under State water law 3 or 4 times more than he is using, the water just isn't there for him. If it is a legitimate right, has been put to use, has been exercised properly, then that individual's rights will be protected under this Compact.

Article V - Administration. Senator Joseph Mazurek, Member

of the Reserved Water Right Compact Commission and SD 23, Helena. Articles V and VI deal with the administration of the water rights on the Reservation. In respect to the Fort Peck irrigation project, the United States will continue to administer water received from the Fort Peck irrigation project. Tribal water uses - The Tribes will administer and enforce all uses of the Tribal water right granted under the Compact and they will do so in accordance with a Tribal Water Code which must be adopted under the Compact. It is required to be adopted within one year from the ratification of the Compact. The Tribes will report Tribal water uses to the State through its Department of Natural Resources and Conservation. The State will continue to administer the State water uses or appropriate rights on the Reservation and we will likewise report State water uses and appropriate rights to the Tribes also on a regular basis. There is protection within the Compact for the regulation of ground water such that neither the Tribes or State will authorize uses of ground water on the Reservation if those uses would significantly degrade the quality of an underground source beneath the Reservation. Article VI - Tribal Use and Tribal Rights establishes the Fort Peck, Montana Compact Board. The purpose of that Board will be to resolve future disputes arising out of interpretation of the Compact or to resolve disputes between an Indian and a non Indian water user. It establishes a 3 member judicial board, essentially an arbitration board, which would be made up of one representative appointed by the Tribes, one member appointed by the Governor, and a 3rd neutral member to be appointed by the Tribal representative and the State representative. In the event those two arbitors could not agree on the third arbitor, the Chief Federal District Judge would select the 3rd arbitor and if he failed to do so, the Chief Justice of the Supreme Court would make the appointment. The Board would have typical judicial powers as outlined in Sections c, d and e. If a decision was made and any party elected to appeal, they could appeal to the Federal District Court, State District Court or, if both parties agree, to the Tribal Court. The operation of the Board will be a time saver in terms of time and money in litigation expense in future disputes as to the meaning of the Compact and disputes between State water users and Tribal water users. He encouraged endorsement of the Compact as our time is short and we need to move it through this process as soon as we can.

Senator Galt then called on Dan Kemmis, Member of the Compact Commission, and former Speaker of the House, to address marketing aspects. Mr. Kemmis said he has been a member of the Select Committee on Water Marketing during the past interim. The Tribes, from the beginning expressed an interest in water marketing if, in the future, it was to their benefit. Once the State tried to form a policy on water marketing, it became important there be some coordination within the Compact and they worked out a unified policy. If the Tribes get involved in any kind of water marketing, they will be almost subject to the same criteria as the State or any other marketer within the State. The criteria for outside the Reservation and market-

ing in general begins on page 8 of the Compact and continues on through page 12. One feature of the Compact of particular importance regarding water marketing, is the possibility that the Tribes in the State would find themselves in a competitive position to see which entity could enter into a water marketing contract. The Compact came up with the idea of joint marketing. If the State decides to market water out of the Fort Peck reservoir or below or if the Tribes decide they want to market from anywhere on the main stem of the Missouri, either of those entities that initiate that marketing have to offer to the other the opportunity to participate in the marketing as a full partner. The Compact also sets a cap on how much would be available to the Tribes to market starting at the 50,000 acre feet level and providing, should the State give itself greater authority to market than is now contained in the water marketing bill, there would be a sliding scale that the Tribe's amount would go up also. In closing, Mr. Kemmis said he was asked by the National Conference of State Legislatures to attend a conference in San Francisco to discuss ways in which States are attempting to avoid expensive and time consuming litigation over natural resource issues. The State of Montana has attracted a lot of attention because of its commitment to attempt to resolve this kind of dispute outside the courtroom. A number of States are watching what we are doing here and he thought a number of western states would follow Montana's lead in this regard.

Senator Galt called upon Caleb Shields, Member, Negotiating Team, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. Mr. Shields spoke on behalf of the Fort Peck Tribes. Full testimony, exhibit #2.

Mona Jamison, Legal Council to Governor Schwinden, was called on to speak. She told the Committee the Indian claims will be established either through court or with the negotiation process. If we have to adjudicate the Indian water claim, we are talking about a huge expense of money, time and a lot of effort by a lot of people. In Wyoming litigation has resulted in the millions, but people should not be compelled to support a Compact just out of fear of what it may cost a State to litigate the rights. The Governor's office was termed "official observers". Their comments were actively solicited and given. They fully support the Compact on the whole. She said the State and the Tribes both got a good deal and they urged a do pass.

Larry Fasbender, Department of Natural Resources spoke next. He was appointed to the Reserved Water Rights Compact Commission prior to becoming Director of the Department of Natural Resources. All the members of the Department, the staff people who worked on it, spent a good deal of time looking at the various provisions of the Compact and relating how it would affect the State of Montana; how they would benefit the State as well as how they played a role in the future negotiations and the future use of water in the State of Montana. They support the Compact as it is written. In arriving at a com-

promise in the way they did, the Compact Commission, the members of the Fort Peck Tribe, the negotiators are all to be commended for the creative way in which they established the federal reserve rights through the Compact Commission for the Indians of the Fort Peck Tribe. It is important for this Legislature to respond quickly, with the little time left. He hoped the complicated issues involved in this Compact can be addressed in the time remaining.

Gordon McOmber said he had hoped Chris Tweeten, a member of the Commission and Deputy Attorney General and Clay Brown could be here. They had been out of town. He assured the Committee that the Attorney General approved what we are doing. Under the original statute we operate under, there was a provision for ratification of this Compact by the United States Congress. Through agreement with Mr. Chambers, Mr. Caleb and Members of the Tribe, they determined they could get the job done by agreement between the State and the Tribe, with approval by the Department of Interior. However, they haven't gotten that upper level approval yet but have been assured by the lower level people they are working with, that we should get that approval very shortly.

Mr. Urban Roth, negotiator and MRWRCC, said this is a complex piece of legislation for a forward piece of legislation and the first step the State of Montana can take in putting behind it some of the tensions and controversies that have risen in the past between our Indian citizens and the rest of the citizens of the State. It is an opportunity to show the rest of the western United States that compromise with Indian Tribes about a very tough subject, water, is possible. He urged its adoption.

Chris Tweeten, Assistant Attorney General for the State of Montana, apologized for coming in late. He said his office has been working closely with the Compact Commission in developing this Compact in the past 5 years and the Attorney General offers his unqualified support for the Compact. While it's unqualified, it is not without some concerns because there are things in the Compact, of course, that have never been tried before, but his office is convinced that the complexity of these issues require some greater solutions. Those are the kinds of solutions that are in this Compact. We think that, as a compromise document, it certainly deserves the interest of the State of Montana as well as the interest of the Assiniboiné and Sioux Tribes. We would urge the Legislature to ratify this Compact, put these solutions in place and, hopefully, we can use this as a model for dealing with the other Indian Tribes in the State to solve these problems in an amicable way, rather than having to go to court and fight them out in a situation that often creates more problems than it solves. On that basis, they would certainly urge that the Compact be ratified.

Jo Brunner, Montana State WIFE and National WIFE Association, in favor. Testimony, Exhibit #3.

Representative Dennis Iverson, HD 12. As it relates to the work I have done, along with many others, concerning Montana's long-range water policy planning, the Compact meshes very well with those plans and should be the direction we take. He supported it.

OPPONENTS: None.

Committee Questions: Representative Rapp-Svrcek to Scott Brown - Are you aware of the Poplar River Power Plant in Saskatchewan? Brown - Yes, I am. Rapp - Was that allocation or use of water taken into consideration in determining this Compact and would it affect it? Brown - It was certainly taken into consideration but our feeling is that there is very little control given the limited things we can do with these negotiations. The international apportionment between Canada and the United States concerning the Poplar River could, indeed, affect water users on the lower Poplar River. In terms of what these negotiations have accomplished, I think it has simply reversed the Tribe organists. In the future now, instead of the Tribes having the first priority, now the existing users along the Poplar River have the first priority. The Poplar River probably doesn't have a great deal of water left in it to appropriate for other purposes above the Reservation. If that's the case, the Compact isn't really going to have that great an affect, or pardon me, just the opposite, the International apportionment probably won't have any more affect on those existing users than it would have had, had it not been there, had there not been an international apportionment. Rapp - Do you anticipate or would it be possible that there might be some contention between Canada and Montana upon approval of this Compact. There would be with the Poplar River Power Plant and Saskatchewan? Brown - My own feeling is that the apportionment allows the US a share and Canada a share, and I think Canada leaves it up to the US to determine how that share will be apportioned within the US. We have shifted those priorities with respect to the Tribes vs the existing users.

Representative Spaeth to Mr. Roth - This is sort of an apportionment and there are Indian and non Indian water rights or users outside the Reservation. I'm not sure what the dual type of usage on the Reservation is. Can the State of MT and can the Tribes bind those people to the agreement of this particular document? Roth - Yes, we have researched that question both in Washington and the State of MT and a considerable amount of study has been applied to your particular question. There does happen to be a case that is similar to the situation we have here where the US Supreme Court stated that a State has sort of a parent's patriarch authority to represent its various water claimants and to codify the rights and prioritize those rights in order to reach a Compact with another sovereign and the US Supreme Court, of course, has recognized Indian Tribes as quasi sovereigns and certainly sovereigns within the spirit we are talking about. So we feel that case gives us abundant authority upon which to predicate this State's authority to

bind these other users. We don't want to lose sight of the fact that the existing users, both Indian and non Indian on both streams are protected by the provisions of this Compact. In other words, any future users of the Tribal water right will be subordinate to all of these existing uses and the Milk River was entirely taken out of the provisions of the Compact except in regard to one very modest ground water claim.

Representative Schultz to Gordon McOmber - At this point, does the Commission and the Tribe have just a verbal agreement?
McOmber - We have an agreement between the Compact Commission and the leadership of the Tribe. They have signed often on this Compact. Now it is up to you to ratify it and up to the Tribal Council to make a determination. Schultz - In looking at the use of ground water, I didn't see the process for establishing rights on the Reservation. McOmber - Existing rights are protected. In the future ground water is available for use either by Indians or non Indians. Under the Indian apportion of the water right, under State law, the restriction on this is that it cannot damage anyone else. Ground water - you can't see it, you don't know how much is there, it is pretty hard to deal with but there is a provision for the protection of existing rights and for future users.

Rapp-Svrcek to McOmber - In the last part of your testimony where you were talking about Interior Department approval - If the Legislature ratifies this, is it possible that a wrench could be thrown into the works by some problem the Interior Department might find in scrutinizing it and, if so, what effect would that have? Would we have to come back here in 2 years? McOmber - You understand that the Department of the Interior has a trust responsibility and I am advised the water is held in trust for the Tribe by the Department of Interior and their approval is needed. It is our feelings that the Legislature should go forth and make its decision and, if something comes up, we'll just have to deal with it at that time. Rapp - Do you anticipate any trouble getting Interior Department approval of the Compact. McOmber - I cannot out-guess the Legislature, so I cannot attempt to outguess the Feds. Reid Chambers, Attorney for the Fort Peck Tribes - Being a Washington attorney and a former Associate Solicitor of the Interior Department, I can add a little bit to that. The Interior Department had a representative at every one of our negotiating sessions going back to 1980, and the Secretaries had a personal representative at every session since November of 1982. They are fully informed about it. They have been involved in drafting the Compact.

Senator Williams to Mr. Fasbender - Upon ratification of this Compact, what effect would that have on the balance of the Reservations and the other drainages within the State?
Fasbender - Aside from the fact that it might be used as a model, I think it would be very encouraging to other Reservations to enter into negotiations and a Compact with the State of Montana. Until those Compacts are arrived at, it is going to slow down our adjudication process. We hope this will be

the catalyst to precipitate the other Tribes to come in and negotiate a Compact so we could continue our adjudication process. Williams - Upon refusal to ratify this, what would that do to your program? Fasbender - It would slow down considerably. I don't anticipate that happening, however.

Senator Kolstad to Mr. Kemmis - During Mr. Shield's testimony he commented briefly on the section that addresses the purposes for which the Tribal water rights are used and under this section it says that within the Reservation use of water is to be exercised as a Tribal water right for any purpose and may be authorized by the Tribes without regard whether such use is beneficial as defined by valid State law. Is there a special reason the Tribes are excluded under State law from complying with the Beneficial Use provision? Kemmis - Beneficial Use Provision is a well established doctrine in most western states applying to State water users. It is important to remember that, while the State has claimed and is exercising jurisdiction over Tribal water rights, those rights continue to be Winters Doctrine rights. The Beneficial Use Doctrine has no application to Winters Doctrine rights. I don't think that even if we were codifying those Winters Doctrine rights on the Reservation, we would be able to enforce Beneficial Use Doctrine on them. We talked about the use of the Tribal water rights outside the Reservation, then it becomes a little bit of a perkier issue and in that regard, then the Tribe has agreed that any use or application of Tribal water right outside the Reservation will be subject to the Beneficial Use Doctrine. What we have in the Compact, what the Tribe has agreed to under the Compact, is that even on the Reservation they will not waste water. Even that is something that, if we were in court, we would not be guaranteed of getting from the Tribes. I think the Compact gives the State a better deal than it would get if it went to court. Under no circumstances, I think, could we expect we could impose the Beneficial Use Doctrine on the State within the Reservation.

Representative Cody to Senator Galt - You have here 49 pages of the bill. It's been my experience since the 7th of January that no 49 page bill gets through both Houses of this Legislature without being amended. How would you address that? Galt - This bill, after it gets through this Committee tonight, unless the Tribe's representative is with us, cannot be amended. If it is amended, it is void and there is no Compact. There are a couple amendments the Tribe, their representative and the Compact Commission worked over this afternoon. We will propose them to you tonight and I would urge the Senate Committee to pass those tonight so that when the bill goes over to the House it is in its final form.

Representative Rapp-Svrcek - Relying on Mr. Shield's testimony where it says the Tribe can determine any purpose for the use of water on the Reservation, that within the Reservation they need not comply with State water administrative regulations and then it talks about industrial facilities and

pipelines that are constructed outside the Reservation - Mr. Shield's testimony doesn't address industrial facilities constructed inside the Reservation. Is it possible that an industrial facility can be constructed inside the Reservation without any regard to the State laws that would govern such a facility outside the Reservation? Kemmis - The Compact certainly doesn't weaken the current State position in that regard. The question of the authority of the State to exercise jurisdiction in siting matters and so on, would be the same with or without the Compact. Mr. Roth - Dan gave a very accurate analysis of the situation. We have not addressed that in the Compact and the state of the law as it presently exists will exist after the Compact. If the State feels it has authority to exert jurisdiction over certain activities within the Reservation, then they will have to try to exert that jurisdiction through court jurisdiction just as they would now.

Senator Galt, in closing, said he would like to impress upon the Committee that this is the most important, far reaching bill they will address in their entire Legislative career. It will set the guidelines for the protection of Montana water within our lifetime. He asked the Committee to consider how serious this is and to remember, once it gets out of this Committee that, unless Mr. Shields and his attorney are in the House, it cannot be amended. If it is amended and they turn it down, there is no Compact.

AMENDMENTS: Marcia Rundell, Staff Attorney for the Compact Commission, presented amendments for SB 467. Exhibit #4. Explanations for amendments follow: Explanation for amendments on page 24 - What we are essentially doing is adding one protected use of water on the Reservation by Indians up. It is a proposed use which recently got the attention of the Tribal attorney and the Compact Commission. Prior to that change, on line 7 after "existing", Insert "and proposed" This is not on the typed list of amendments. So, line 7, page 24 will read: "1. The following and proposed uses of water by Indians" Explanation for changes on p. 28. That change was deemed advisable by both parties because of the uncertainty of the speed in which the Interior might approve this document, and so we are providing that the Tribe will provide notice within 6 months after the Tribal Code takes effect or if it is disapproved by the Secretary, which we do not anticipate, we nevertheless are trying to provide that the the Secretary of the Interior would provide notification to the State. We have provided in the Compact a process of mutual reporting, from the State to the Tribe and the Tribe to the State, of existing uses and then of new uses. Amendments on p. 40 were deemed advisable because the parties will be bound upon ratification by their respective legislatures and upon approval by the appropriate departments of the United States. Explanation of amendments on p. 41 - This section provides for the process for incorporation of the Compact into the decrees and in the eventuality that the Compact is entered into a federal court, rather than the State water

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adjudication, we needed to make it clear that the entire process we are talking about is in all of Section B not just the first paragraph of that section.

Senator Boylan asked if there were any questions on the amendments and, if everyone here tonight were in agreement with the amendments. He asked if anyone had any objections to the amendments. There were none.

Reid Chambers, Tribal Attorney, said the Tribes support all of these amendments, particularly the amendment that was occasioned by the need to protect the 300 acres. They just found out a couple weeks ago, going into the irrigation, there was a confluence. The Porcupine and Milk River are being prepared now for irrigation and that is a protection.

Senator Conover to Senator Galt - Regarding your comments a while ago on adjudication, will this encourage or hurry up the adjudication of the Tribes in the southern part like on the Little Big Horn? Galt - I certainly hope it would encourage all the other Indian tribes. They are either going to have to go through this negotiation or they are going to have to litigate. They are going to have to face the blaze one way or another. We passed a law this session extending the Reserved Water Right Compact Commission until 1987. If, by that time we go out of existence, there will be no forum for the remaining Tribes to negotiate with and we will probably be in court, because that is provided for in law, too, that if they don't negotiate after a six months period, we begin litigating.

Representative Jenkins to Senator Galt - If we pass this bill now, this hasn't been ok'd by the Department of Interior or the Indian Tribes, can they amend this bill? Galt, No, not without our approval, meaning the Legislature. Jenkins - So if they put any amendments on after this bill leaves here, it is null and void. Galt - There will be no Compact.

Senator Boylan asked if that was understood by everybody.

Marcia Rundell said the Agriculture staff attorney had spoken to her earlier and she had neglected to discuss it with the attorney for the Tribes but has now done so. 85-2-702, the sections outlining the procedure for ratification of the Compact, provides that Compacts will be effective upon ratification but there is also a section in Montana law that provides that all bills are effective on October 1st unless otherwise provided. The Tribal attorney and the Compact Commission agree that we should probably add another section to SB 467 to provide that it will be effective upon passage and approval by the Legislature, and I think Mr. MacMaster has the appropriate language - and approval by the Governor. John MacMaster - What we would do is on page 49, the last page of the bill, following line 5, you have the following: "Section 2. Effective date. This act is effective on passage and approval." Senator Boylan - By just the Legislature,

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or just the Tribes or everybody? John - That would mean passage by the Legislature and approval by the Governor, because the bill, itself, is what you are talking about.

Senator Galt moved the amendment. Motion carried.

John - If Senator Galt would move to amend the Title of the bill also to provide the immediate effective date. Galt - Let's make it two separate motions. I move the list of amendments we have before you presented by the staff attorney and approved by the Tribe and their attorney be adopted. Motion carried.

Senator Galt then moved page 1, line 7, following the last word, add "; and providing an immediate effective date." Motion carried.

DISPOSITION OF SB 467: Senator Galt moved before the Senate Agriculture Committee that SB 467, as amended, DO PASS. Motion carried.

SJR 41: Senator Joe Mazurek, HD 23, Helena. If you look at page 46 of your bill, you will notice in Article XII of the Compact entitled Legislation, sub paragraph B, beginning on line 2 of page 46 entitled Petition to Congress, one of the elements of the Compact, the parties to the Compact have agreed that the Compact Commission will introduce this Resolution SJR 41, before this Legislature. The Resolution urges Congress to adopt legislation which would authorize the Tribes to enter into joint venture agreements and other similar water agreements. This Resolution would encourage Congress to adopt an act similar to the 1982 Mineral Leasing and Development Act. It encourages Congress to pass the enabling legislation authorizing Tribes to enter into water agreements such as those contemplated in the marketing provisions. You might also note that the Compact provides it is not effective until this Resolution is approved by the Legislature and submitted to Congress. I urge your review and passage of the Resolution. As I indicated, it is merely encouraging Congress to adopt the enabling legislation necessary for the Tribes to enter into water agreements. It is necessary because there is some concern that the Compact could be said to limit the use of trust property, those being water rights, and legislation by Congress would be necessary, so I urge your adoption of this Resolution. All the testimony you have previously heard relates directly to this Resolution and I won't take up any more of the Committee's time repeating all of it.

Senator Galt - I would say that everybody that testified for the Compact would testify for this Resolution also, and we urge you to pass it, but we don't want to belabor you with a whole lot more testimony.

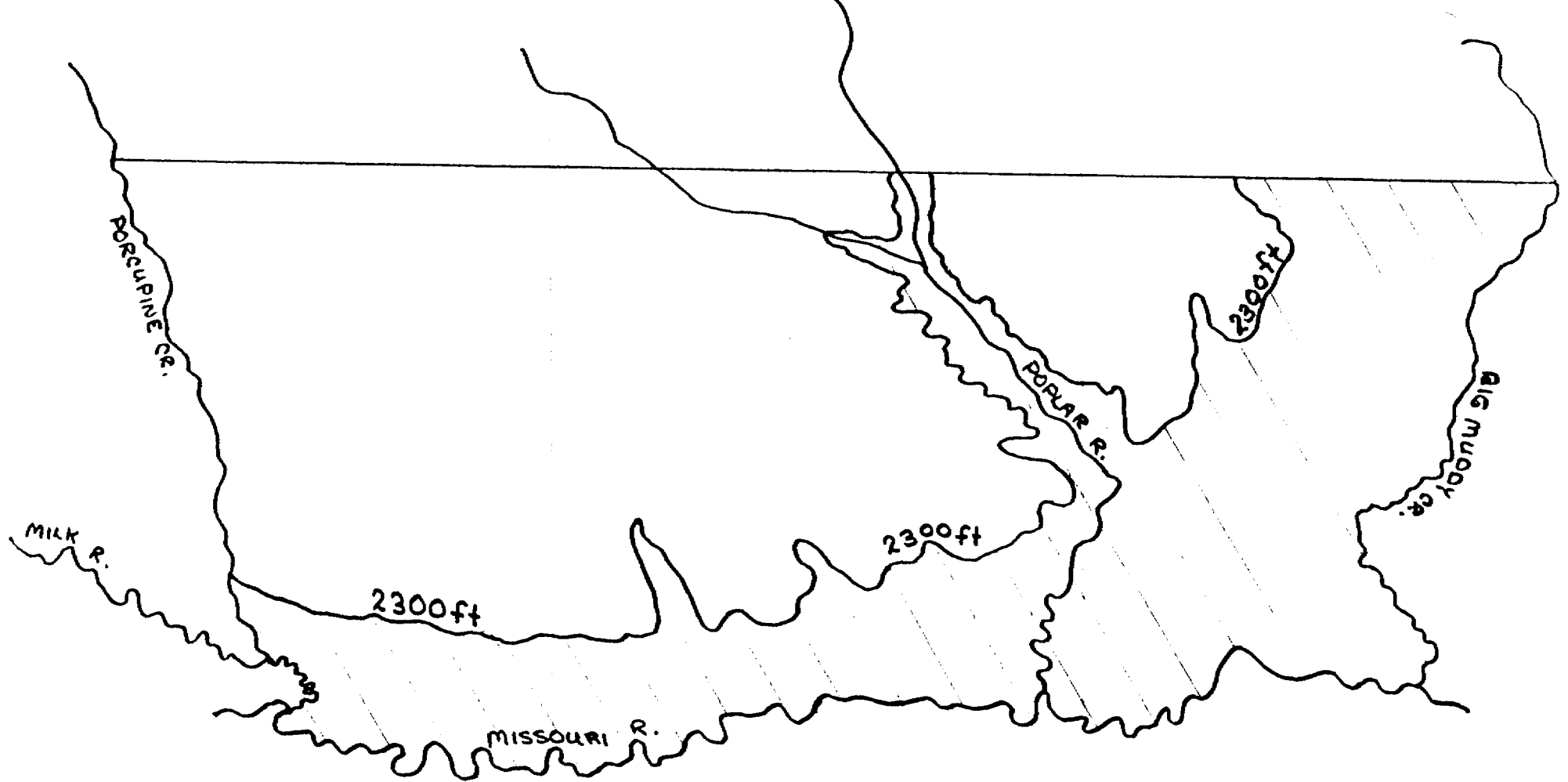
Committee questions - Representative Rapp-Svrcek to Chambers - It is my understanding that the passage of the Compact is

VISITORS' REGISTER

[illegible]

(Please leave prepared statement with Secretary)

[illegible][illegible]



FORT PECK INDIAN RESERVATION

TOTAL AREA - 2,093,124 ac.

TOTAL AREA BELOW 2300 ft. - 753,130 ac.

TOTAL OF INDIAN FEE LANDS AND TRUST LANDS BELOW 2300 ft. AND CLASSIFIED AS IRRIGABLE (CAPABILITY CLASS II, III, IV) - 282,410 ac.

TOTAL OF CURRENTLY IRRIGATED BIA PROJECT LANDS ON MISSOURI RIVER - 9,388 ac.

(282,410 ac. + 9,388 ac. = 291,798 ac.)

(291,798 ac. X 3.6 afa = 1,050,472 afy)

(291,798 ac. X 1.8 afa = 525,236 afy)

0.1
0.2
0.3
0.4
0.5
0.6
0.7
0.8
0.9
1.0

7-13-#2
58707
4-15-85

STATEMENT OF

CALEB SHIELDS

Member, Negotiating Team
Assiniboine and Sioux Tribes of the
Fort Peck Indian Reservation

Before the
Joint Hearing of the
Senate and House Committees
on Agriculture

April 15, 1985

Members of the Joint Committee, thank you for the opportunity to appear before you this evening. My name is Caleb Shields. I am a member of the Tribal Executive Board, which is the governing body of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. I am also a member of the tribal negotiating team that has worked with the State Compact Commission to agree on this water Compact. I am joined here tonight by our tribal attorney, Reid Chambers.

I speak on behalf of the tribal negotiating team, which has unanimously recommended this Compact to the Tribal Executive Board for ratification. The Tribal Executive Board is our tribal legislature. It is considering our negotiating team's recommendation, just as the State Legislature is considering the recommendation of the State Compact Commission.

Let me take a few minutes to tell you what this water compact means to the Fort Peck Tribes, and briefly to describe its key provisions.

1. Quantification

The Compact determines finally and forever the quantity of water reserved for the Assiniboine and Sioux Tribes by federal law at 1,050,472 acre feet of diversions, or a consumptive use of 525,236 acre feet, per year. The Tribes'

priority date is May 1, 1888. On the Reservation the Tribes can divert from any surface or ground water source, except the mainstem of the Milk River. A maximum of 950,000 acre feet may be diverted, and 475,000 acre feet may be used, from surface water each year.

This quantification of our reserved water rights was agreed by both parties after careful study and classification of Reservation lands in regard to their irrigability. However, the Tribes can use water for irrigation, or for any other purpose determined by them on the Reservation. Part of the Tribes' water right may be used to establish instream flows to protect fish and wildlife resources on various tributary streams on the Reservation.

The Compact provides that non-use of the Tribal Water Right does not abandon or forfeit the right, which is a standard component of reserved water rights.

2. Protection of existing uses

The Compact protects all existing Indian and non-Indian uses on the streams that flow through, and the ground water basins that underlie, our Reservation. About 33,000 acres are presently irrigated from these streams or ground water basins, mostly by non-Indians. Under the Winters

Doctrine, we are confident that the Tribes could in litigation cut off most if not all these non-Indian uses by virtue of our early priority date. But under the Compact, these and all present and future domestic uses, as well as future stock watering impoundments ^{not} in excess of 20 acre feet per year - by Indians and non-Indians alike, from surface and ground water - can continue. All new non-Indian uses, however, will be subordinate to future exercise of our reserved rights.

3. Administration and Dispute Resolution

The Compact settles the present water rights litigation in federal and state court, and removes causes of future water rights controversies. This is done by establishing clear and separate state and tribal systems for administering water rights, and by providing a Joint Tribal - State Board as the exclusive forum to determine any disputes that do occur.

The United States will continue to administer and settle disputes concerning water use on the Fort Peck Irrigation Project, which is a federal water project diverting water out of the Missouri River on our Reservation, serving Indian and non-Indian lands. The Tribes will administer all other uses of water of the Reservation by itself, by Indians, or by non-Indians who claim a water right under federal law

because they purchased a former trust allotment. The Tribes will adopt a water code, and will also resolve all water disputes among these persons. The state will administer all water rights established pursuant to state law, including by non-Indians on the Reservation, and resolve all disputes among state water users.

These separate administrative systems make it less likely a dispute will arise between the Tribes and the State. If one does occur, or if a dispute arises between a tribal water user and state water user, it will be determined by a new Joint Tribal-State Board established by the Compact.

The Board has one representative from the State, one from the Tribes, and a third to be selected by neutral means.

It has the power to subpoena witnesses, to hold hearings and take testimony. All decisions must be by majority vote. Appeals of the Board's decisions may be had in a court of competent jurisdiction, but the scope of review is limited in a fashion very similar to that of an award in binding arbitration. Decisions are enforceable in any court of competent jurisdiction unless an appeal is timely filed.

I must emphasize that the Tribes would not have agreed to any Compact which provided that state courts would resolve these disputes. The establishment of the dispute

resolution system by the Board is in the view of our tribal negotiating committee essential to any settlement.

Tribal water marketing

The Compact recognizes that the Tribes may market water within our Reservation to non-Indians without complying with state law or administrative regulations. Outside the Reservation, the Tribes may also market without complying with state law or administrative regulations so long as the following requirements are met.

First, the water must be diverted from the surface of the Fort Peck Reservoir or the mainstem of the Missouri River downstream from Fort Peck Dam. (I should point out that diversions are also possible for water marketing out of the mainstem Missouri River above Fort Peck Reservoir and by deferral agreements on reservation tributaries. As to these, however, state law must be observed.)

Second, outside the Reservation water must be used for a beneficial purpose as that term is defined by valid state law at the time the Tribes propose the use. This means that if the State defines a particular use as non-beneficial for all its citizens, it can also impose a non-discriminatory ban on tribal water marketing for that use.

Third, any export of the Tribal Water Right outside Montana must similarly comply with valid state laws at the time the export is proposed. At this time, we cannot foresee with certainty what limits the federal Constitution imposes on state export restrictions or what if any restrictions on water exports future legislation will contain.

Fourth, industrial facilities or pipelines using or transporting water marketed by the Tribes or constructed by the Tribes outside the Reservation must comply with valid state laws such as the Major Facilities Siting Act that regulate the construction or operations of such facilities.

Fifth, the quantity of water marketed by the Tribes outside the Reservation in any year is limited by reference to the amount of water authorized to be transferred by the State. If the State water marketing is less than 50,000 acre feet per year, the Tribes can market any quantity permitted by federal law or ~~by state law regulating private water users.~~ *- if federal law has no limits -* But in all events, the Tribes may market at least 50,000 acre feet per year.

Sixth, the Tribes must give notice to the State showing that

(a) the means of diversion and construction and operation of diversion works for tribal water marketing are adequate,

(b) the diversion will not adversely affect any federal or state water right actually in use at the time the diversion is proposed,

(c) the proposed use does not cause any unreasonable significant environmental impact, and

(d) that certain large diversions will not be made that significantly impair the quality of water for existing uses, use high-quality water where low-quality water is legally and physically available to the Tribes for the use, create or contribute substantially to saline seep, or substantially injure fish or wildlife populations.

These above criteria somewhat resemble state law. The Tribes agreed to observe them because - considering that the source of the diversions will be the mainstem of the Missouri River from Fort Peck Reservoir or downstream - we believe these criteria can be readily satisfied. For example, given the amount of water in the Reservoir and downstream, it is extremely unlikely that a diversion could adversely affect existing users, impair Missouri River water quality, create saline seep, or the like. And under existing federal law, we believe that users of tribal property outside a Reservation, even tribes themselves, must comply with general environmental laws or statutes like the Major Facilities Siting Act. If a challenge is made that these requirements are not satisfied, it must be tried in court and not before any administrative agency.

Seventh, in a unique provision, the Tribes have agreed to offer the State the opportunity to participate in any marketing proposal we develop outside the Reservation. The

State will do the same for the Tribes for opportunities in Fort Peck Reservoir or the mainstem Missouri River below Fort Peck Dam.

Conclusion

Like many provisions in this Compact, this reciprocal joint venture concept opens a way for our Tribes and the State to work together on water matters, and to cooperation, rather than combat where one side imposes its will on the other, as is the nature of litigation.

This Compact contains a number of unusual provisions toward that end. As a joint board resolves any disputes, as joint water marketing proceeds, as existing uses, Indian and non-Indian alike, are protected, the prospect emerges for genuine collaboration where the Tribes and the State progress and prosper together on water development. The creative promise of this Compact is that both the Tribes and the State can do better together as collaborators than either can do separately as disputants. It is in that hope that our tribal negotiating team recommends its ratification by your legislature and by ours.

Exhibit #3

NAME:

J. L. Bremer

DATE:

4/15/55

ADDRESS:

1469 Radnor Rd. A. L. E. -

PHONE:

443-4254

REPRESENTING WHOM?

Montana State & National Women Involved in
Farm Economics

APPEARING ON WHICH PROPOSAL:

S.B. 416 - S.J. 41

DO YOU:

SUPPORT?

☒

AMEND?

OPPOSE?

COMMENTS:

One of ^{Montana} 70.1 F's earliest decisions on water
policy was the resolution to support state regulation
with the tribes and we have been very strong supporters
over the years. I think a few of our member states
have Indian reservations within their borders so
we found it fairly easy to gain national approval
for those states to follow Montana lead to regulation
not litigation. We recognize the intense efforts put
forth in arriving at this point and while we
still must take this comment to our membership - it
has been our desire to support regulation and not
by such negotiation of the tribes and all states and we
certainly do not have an desire to challenge or disregard of
this compact. Thank you

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

amendments to SB 467. Write introduced copy.

Exhibit #4
SB 467
4-15-35

1. Title, line 7.

Following: "RESERVATION"

Insert: "; PROVIDING AN IMMEDIATE
EFFECTIVE DATE"

2. Page 24, line 7.

Following: "existing"

Insert: "and proposed"

Rita. 467

PROPOSED AMENDMENTS TO SB 467

3. Page 24, line 14.
Following: "watershed;"
Strike: "and"
4. Page 24, line 16.
Following: "watershed"
Strike: "."
Insert: "; and"
5. Page 24, line 17. *Following: line 16*
Insert: "(d) a maximum of 300 acres of land irrigated with ground water near the confluence of Porcupine Creek and the Milk River."
6. Page 28, line 23.
Following: "after"
Strike: "adoption of"
7. Page 28, line 24.
Following: "code"
~~Strike: "and"~~
Insert: "takes effect or within six months after disapproval by the Secretary"
8. ~~Page 28, line 24.~~
Following: "Tribes"
Insert: "or the Secretary of the Interior"
8. Page 40, line 18.
Following: "and"
Strike: "by"
9. Page 40, line 19.
Following: "Board"
~~Strike: "and"~~
Insert: "and approved by the United States Departments of Justice and the Interior"
10. Page 41, line 9.
Following: "this"
Strike: "paragraph"
Insert: "section"

11. Page 41, line 10.
Following: "filed"
Insert: "as a proposed consent decree"

12. Page 43, line 10.
Following: "the"
Strike: "state."
Insert: "State."

13. Page 49, Following line 5.

Insert: "Section 2. Effective Date. This act is
effective on passage and approval."

THE SESSION

The Independent Record, Helena, Mont., Tuesday, April 16, 1985—1B

Historic step between state, Indians

by TOM COOK
State Bureau

Legislation to establish water rights on the Fort Peck Indian reservation was called a step of historic importance to state government relations with Montana's Indian tribes Monday.

In an unusual joint meeting of the House and Senate Agriculture committees Monday night, the water compact bill, SB487, appeared headed for quick action by the Legislature.

The agreement, which must be ratified by the Legislature and the Fort Peck Tribal Council, was worked out late last week after

more than five years of difficult and often controversial discussions.

"When I came to the Legislature I never thought that I would have a bill as important as this bill is," veteran Sen. Jack Galt, R-Martinsdale, said.

Caleb Shields, a member of the Fort Peck council, said the agreement was to be presented officially to tribal officials today, but that no opposition to it has surfaced yet.

Having been involved in the water compact discussions since their inception, Shields said there were times when he thought it was a futile effort.

"I think this is very significant,"

Shields said. "If something as complex as a water rights matter can be worked out by talking, other matters equally difficult between

would be a poor reason for the Legislature or the tribe to accept the agreement.

"The state got a good deal, and

The bill amounts to 'the first treaty signed with the tribes in many years.'

the state and the tribes can be worked out."

Several people testified that the negotiated agreement would head off costly and time consuming legal battles to settle Indian water rights in court.

But Mona Jamison, legal counsel for Gov. Ted Schwinden, said that

the tribes got a good deal," she said.

Sen. Joe Mazurek, D-Helena, a member of the Reserved Water Rights Compact Commission, said the bill amounts "to the first treaty signed with the tribes in many years."

All stops are being pulled out to

have the bill acted on during the last couple of weeks of the session, he said. Because the bill transmittal date has passed, it will require a two-thirds vote of both houses to suspend the rules to allow it to be considered.

No one testified against the bill Monday.

In a nutshell, the bill guarantees the reservation 1.65 million acre feet of water a year in total diversion of surface and ground water with up to half of that for consumptive use. An acre foot is the amount of water needed to cover an acre of land to a depth of one foot.

Up to 950,000 acre feet a year can be diverted from surface water

sources with half of that eligible for consumptive use.

The tribe has agreed to honor existing water claims of non-Indian landowners on the reservation, which Shields described as a major concession.

A three-member board consisting of a person chosen by the state, a person chosen by the tribe and a third member agreed to by those appointees will arbitrate.

In order to prevent future bidding wars between the state and tribe for water marketing, the compact essentially requires that either side offer the other a chance to share in any sales of water involving reservation claims.

MINUTES OF THE MEETING
AGRICULTURE COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

April 19, 1985

The meeting of the Agriculture Committee was called to order by Chairman James Schultz at 9:05 a.m. in Room 312-1 of the State Capitol.

ROLL CALL: All members were present except Representative Robert Ellerd, who was excused.

Chairman Schultz opened the committee by stating that because both of the bills scheduled were heard in conference committee on April 15, that speakers would be asked to limit their comments to new material, and not to repeat the hearing process.

SENATE BILL 467: Sen. Jack Galt, District 16, sponsor of SB 467, told the committee that because the bill was discussed in detail at the previous hearing, he would limit his comments to addressing specific questions from the committee. He urged a favorable decision on the bill.

PROPONENTS: Sen. Joe Mazurek, District 23, rose as a supporter of SB 467, and said he too would limit his comments to answering questions from committee.

Sen. Mazurek noted that although the bill was slightly amended on second reading in the senate, that amendment was not reflected in the copy before the committee members. The amendment did appear on the original copy of the bill, however, and the bill was considered by committee as amended.

Gordon McComber, chairman of the water rights compact commission, spoke in support of SB 467. He said he understands the concerns that some people have expressed about the late introduction of the bill, but said it is in the best interests of the compact and the state to pass the bill as soon as possible.

Caleb Shields, representing the Fort Peck tribes on the water compact commission, said the tribes had provided their testimony at the April 15 meeting. Mr. Shields said he concurred with Sen. Mazurek's comments, and told the committee that the tribes are in full support of SB 467.

Rep. Jack Ramirez, District 87, spoke as a proponent of SB 467, adding that he was speaking as a proponent only because he did not want to appear as an opponent of the bill. He cautioned that SB 467 is unlike any bill that had come before the legislature during his tenure, and that it deserves special and careful consideration. SB 467 is not something that can be amended in two years, he said. Rep. Ramirez said the compact "will bind future generations forever." He said he has confidence in the people who developed the bill, but is concerned about acting on it too quickly. He urged the committee to review the bill carefully, to ask questions, and to be satisfied that the bill is fully understood before endorsing it.

There were no further proponents, and no opponents to SB 467.

DISCUSSION OF SB 467: Rep. Dean Switzer asked Rep. Dennis Iverson to comment on the bill. Rep. Iverson told the committee that he was quite pleased with the compact. He said if there is a concern about the bill, it would be that noted by Rep. Ramirez. However, Rep. Iverson said he believed the compact commission did an excellent job of supplying adequate notice to the public and to landowners who would be affected by the compact.

Rep. Iverson said that each member of the House would be given an outline of the compact, and that he would ask the speaker not to schedule the bill until April 22, so that each member would have time to become familiar with it.

Rep. Paul Rapp-Svrcek asked Rep. Iverson if SB 467 would dovetail with HB 680, the water policy bill passed earlier this session. Rep. Iverson said that one of the best features of the compact is that it meshes perfectly with the goals and procedures of the state's new water policy act.

Rep. Dorothy Cody asked Mr. McComber if there is any provision in the bill for amending the compact at a later date if circumstances indicate that such change is necessary. Mr. McComber said that if all parties to the compact agree to meet and mutually approve a change, then the compact can be amended.

Rep. Rapp-Svrcek asked Scott Brown, a member of the compact commission, for a further clarification of how much water that is diverted under the terms of the contract can go toward consumptive use by the tribes. Mr. Brown said that at no time could the tribes make consumptive use of the entire amount of water that can be appropriated and reserved under the terms of the compact.

Rep. Ramirez asked to be allowed to address the question raised by Rep. Cody, and told the committee that while any agreement can be changed by mutual consent, it is crucial to remember that no party will be likely to make a change that it does not consider advantageous. For that reason, he said, it is necessary that the legislature fully understand the ramifications of SB 467, and not fall back on the idea that unsatisfactory conditions of the compact can be changed. In every agreement, he said, there are trade-offs. He urged the committee to examine carefully what the state is giving up under SB 467, and what it will get in return.

Rep. Jenkins asked if the Fort Peck tribes will be allowed to sell water they receive from Fort Peck Reservoir under the terms of the compact. Mr. McComber said the tribes will be authorized to transfer water to which they hold legal rights under the compact. Rep. Jenkins asked if the potential sale or transfer of water would be considered a consumptive use, and was told by Mr. Brown that it would. Rep. Iverson added that consumptive use by the tribes, specifically the use of pipelines in water marketing, is limited by the bill. Rep. Jenkins said his main concern was that downriver agricultural users would not be denied water as a result of diversion and consumption by the tribes. Mr. Brown said that is a legitimate concern, and was addressed by the commission in drafting the compact. Prior use of water rights will not be interrupted, he said.

Rep. Switzer asked if water that may be appropriated by the tribes will come from the Missouri River or from Fort Peck Reservoir. Mr. Brown told him that the authorized amount to be diverted may come from either the reservoir or the river.

Rep. Jenkins asked if water rights, as delineated under the compact, would be solid prior to final adjudication by the water courts. Mr. McComber assured him that prior water rights will be upheld. The tribe has agreed to honor water rights granted on the reservation to non-Indians prior to the end of 1984, he said. He stated that passage of the compact is important to make sure those rights are not inferior.

Rep. Patterson asked if the bill represents the first such compact in the nation, and Rep. Galt said it did.

Rep. Schultz asked Sen. Galt to address the question of Indian and non-Indian water rights on ranches that border the reservation, and Sen. Galt said that everyone who has a legitimate water right "will be protected, 100 percent."

Rep. Schultz asked for an explanation of why the compact addresses water rights both above and below Fort Peck Dam. Mr. Brown responded that some people might question why the state is allowing tribal reservation of water. An important reason, he said, is that the tribes have a substantial water right, dating to 1884. There are not many users who have a superior right, he said. He continued that the tribal right is large, and cannot be lost through non-use. Therefore, if the tribes chose to divert water from the natural flow of the river, instead of from reservations, they could move up the river, and "pick off" inferior water rights. The concession made by the state is that the tribes get the benefit of water storage, but the benefit to the state is protection of water rights, he said.

There were no further questions from committee, and Sen. Galt closed by urging passage of SB 467.

SENATE JOINT RESOLUTION 41: Sen. Joe Mazurek, District 23, introduced SJR 41, which he sponsored. He said that he would not repeat the comments made at the April 15 hearing, but encouraged the committee to approve HJR 41, which would ask Congress to adopt enabling legislation for the tribes to enter compacts.

PROPOSERS: Sen. Jack Galt told the committee he was "certainly a proponent" of SJR 41. Rep. Dennis Iverson said SJR 41 would be vital to the compact, and Mr. McComber agreed.

There were no opponents to SJR 41.

DISCUSSION OF SJR 41: Rep. Cody asked whether the tribes already have the right to enter into the compact, and if the resolution was really necessary.

Sen. Mazurek replied that water allocated under SB 467 is no different than any other tribal trust property, and it is arguable that some sort of federal provision is needed to authorize use of that trust property.

Rep. Orval Ellison asked what will happen in 50 years when the compact expires. Mr. Shields said that federal law does not allow tribal lease arrangements of more than 50 years' duration, but that such arrangements can be reviewed and renewed at that time.

Rep. Cody asked Sen. Mazurek what will happen if Congress does not adopt the enabling legislation requested in SJR 41. Sen. Mazurek replied that there is some question whether

that legislation is absolutely necessary, and that it will not affect the validity of the compact in any event. The condition of the compact is only that the resolution be approved by the state legislature, he said.

Rep. Schultz asked Sen. Mazurek if the resolution should be passed by the legislature prior to the passage of the bill, since the compact depends on the approval of the resolution. Sen. Mazurek agreed that that would be the correct order of passage.

There were no further questions from committee, and Sen. Mazurek closed without further comment.

EXECUTIVE ACTION

SENATE BILL 467: Rep. Dorothy Cody moved that SB 467 BE CONCURRED IN. Rep. Rapp-Svrcek seconded that motion. Rep. Ramona Howe voted against the motion, all other members of the committee voted in favor it it.

Representatives Iverson and Spaeth agreed to carry the bill on the floor.

SENATE JOINT RESOLUTION 41: Rep. Cody moved that SJR 41 BE CONCURRED IN, and Rep. Rapp-Svrcek seconded that motion. The motion passed unanimously.

There being no further business before the committee, the meeting was adjourned at 9:50 a.m.


Rep. JAMES SCHULTZ, Chairman

DAILY ROLL CALL

HOUSE AGRICULTURE COMMITTEE

49TH LEGISLATIVE SESSION -- 1985

April 19, 1985

SCHULTZ, JAMES	-	Present
HOLLIDAY, GAY	-	Present
BACHINI, BOB	-	Present
CODY, DOROTHY	-	Present
COMPTON, DUANE	-	Present
DEVLIN, GERRY	-	Present
ELLERD, ROBERT	-	Excused
ELLISON, ORVAL	-	Present
FRITZ, HARRY	-	Present
HOWE, RAMONA	-	Present
JENKINS, LOREN	-	Present
KELLER, VERNON	-	Present
KOEHNKE, FRANCIS	-	Present
PATTERSON, JOHN	-	Present
POFF, BING	-	Present
RAPP-SVRCEK, PAUL	-	Present
SPAETH, GARY	-	Present
SWITZER, DEAN	-	Present

VISITOR'S REGISTER

HOUSE AGRICULTURE

COMMITTEE

BILL SB 467

DATE _____

4/19/65

SPONSOR Sen. Galt

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.